Filed 1/16/19 P. v. Johnson CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL MURRY JOHNSON, Defendant and Appellant.	F074340 (Super. Ct. No. F14908082) **ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING** **[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on December 19, 2018, be modified in the following particulars:

1. On page 2, after the second full paragraph, the following is inserted:

> On December 19, 2018, this court filed its original opinion in this matter affirming the judgment. On December 21, 2018, appellant filed a petition for rehearing, raising two issues. First, he again asserted that the trial court abused its discretion by denying his motion for a new trial based on ineffective assistance of counsel. Second, he claimed for the first time that, in light of Senate Bill No. 620, this matter should be remanded to the superior court to permit the court to exercise its new sentencing discretion whether it should strike the firearm enhancements which the jury found true. (§ 12022.53, subd. (h).)

On January 3, 2019, this court ordered respondent to file an answer to appellant's petition for rehearing limited to the second issue raised in the petition. On January 11, 2019, respondent filed its answer. Respondent agreed that, while Senate Bill No. 620 retroactively applied to appellant, remand was inappropriate based on the sentencing record.

After reviewing the sentencing record, we disagree with respondent. We remand this matter to the superior court so it may exercise its sentencing discretion under Senate Bill No. 620 regarding the firearm enhancements. (§ 12022.53, subd. (h).) In all other respects, we again affirm the judgment.

2. On page 28, after the last full paragraph, the following heading and paragraphs are inserted:

VI. We Remand This Matter For The Trial Court To Exercise Its Discretion Regarding The Firearm Enhancements.

At the time of appellant's 2016 sentencing in this matter, the trial court was required to impose an additional prison sentence for the firearm enhancements found true under section 12022.53. (Former § 12022.53, subds. (a)(1), (d) & (h).) On October 11, 2017, however, the Governor approved Senate Bill No. 620 (Stats. 2017, ch. 682), which amended, in part, section 12022.53. Under the amendment, a trial court now has discretion to strike or dismiss firearm enhancements. (§ 12022.53, subd. (h).)

In its answer to appellant's petition for rehearing, respondent agrees, as do we, that Senate Bill No. 620 applies retroactively to appellant because his case is not yet final. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678–679.) Respondent, however, argues that remand is inappropriate, asserting that the sentencing record clearly indicates the court would not have struck the firearm enhancements. (See *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) We disagree that remand is inappropriate.

Prior to sentencing in this matter, the probation department recommended that the trial court should impose a total term of 118 years, which included an upper term of nine years for count 2, the attempted murder. (§§ 664/187, subd. (a).) The court, however, declined to impose the upper term in count 2, and, instead, imposed the middle term of seven years. This resulted in a total term of imprisonment of 114 years.

A remand is proper because the record contains no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements. (*People v. McDaniels, supra*, 22 Cal.App.5th at pp. 427–428.) Although the court imposed a substantial sentence, it expressed no intent to impose the maximum sentence. Nothing in the record rules out the possibility, however slight, that the court might exercise its discretion to strike a firearm enhancement. (*Id.* at p. 428 [noting under its record that the trial court could strike a firearm enhancement].)

To support its position, respondent notes that, during sentencing, the trial court declined to strike appellant's prior strike conviction and it imposed consecutive sentences in counts 1 and 2. Further, the court noted that, even if it had discretion to impose concurrent sentences, it would not do so based on the nature of this crime, appellant's criminal history, his lack of remorse, and the danger he presented to society. In addition, the court found factors in aggravation but no factors in mitigation. Because the court declined to strike appellant's prior strike conviction, and it stated it would not impose concurrent sentences under any circumstances, respondent argues there is "no reason to think" the trial court might exercise its discretion to strike a firearm enhancement. We disagree.

Although the record indicates the court was not sympathetic towards appellant, and not without good reason, it remains that the court sentenced appellant at a time when it lacked discretion to strike or stay the firearm enhancements. While we do not minimize the seriousness of the present crimes or the gravity of appellant's criminal record, appellant is entitled to be sentenced in the exercise of " 'informed discretion.' [Citation.]" (*People v. McDaniels, supra*, 22 Cal.App.5th at p. 425.)

Firearm enhancements carry heavy terms and often constitute a substantial portion of a total sentence. (*People v. McDaniels, supra*, 22 Cal.App.5th at p. 427.) Because of these "high stakes," a reviewing court should allow the trial court to decide "whether these enhancements should be stricken, even when the reviewing court considers it reasonably probable that the sentence will not be modified on remand." (*Ibid*.) In light of the lengthy sentence imposed here, a large portion of which is attributable to the two firearm enhancements, and based on a possibility that the court might strike at least one enhancement, remand is appropriate. We express no opinion on how the court should exercise its discretion on remand. However, for the reasons discussed, we disagree with respondent that no purpose would be served in remanding this case for reconsideration.

3. On page 28, the sentence appearing under **DISPOSITION** shall be deleted and replaced with the following language:

> This matter is remanded to the superior court for the limited purpose of allowing the court to consider whether to strike or dismiss the firearm enhancements pursuant to section 12022.53, subdivision (h). If the court strikes or dismisses one or both firearm enhancements, then the court shall resentence appellant accordingly and shall forward an amended indeterminate abstract of judgment to the appropriate authorities. If the court declines to strike or dismiss these enhancements, appellant's previously imposed sentence shall remain in effect. In all other respects, the judgment is affirmed.

Appellant's petition for rehearing is denied. Except for the modifications set forth herein, the opinion previously filed remains unchanged. The modification does not alter the judgment.

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LEVY, Acting P.J.

WE CONCUR:

_____
SMITH, J.

_____
DE SANTOS, J.

Filed 12/19/18 P. v. Johnson CA5 (unmodified opinion)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL MURRY JOHNSON, Defendant and Appellant.	F074340 (Super. Ct. No. F14908082) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Kimberly A. Gaab, Judge.

Peter Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Assistant Attorney General, R. Todd Marshall and A. Kay Lauterbach, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted appellant Michael Murry Johnson of first degree murder for the shooting death of Leonard Greenberry (Pen. Code, § 187, subd. (a);[1] count 1). Appellant was also convicted of attempting to murder Earl Perry stemming from the same incident (§§ 664/187, subd. (a); count 2). In both crimes, the jury found true firearm enhancements (§ 12022.53, subd. (d)). The trial court found true that appellant had suffered a prior strike conviction (§§ 667, subds. (b)-(i) & 1170.12, subds. (a)-(d)). Appellant received a prison sentence of 114 years to life.

Appellant raises four different issues on appeal. He alleges (1) the evidence was insufficient to support the convictions; (2) the trial court abused its discretion in denying a motion for new trial; (3) the trial court twice erred in permitting the admission of certain testimony; and (4) prosecutorial misconduct occurred during closing arguments. Although we agree that prosecutorial misconduct occurred during closing arguments, we find merit to respondent's assertion that appellant forfeited this issue on appeal. In any event, we also determine that prejudice did not occur. We reject appellant's remaining claims and affirm.

BACKGROUND

I. The Relevant Facts From The Prosecution's Case.

We provide a relevant summary of the facts from the prosecution's case.

A. One witness identifies appellant as the shooter.

This shooting occurred around 2:00 a.m. on August 24, 2014, outside a social hall in Fresno, California. Leonard Greenberry was shot three times and he died from those

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[1] All future statutory references are to the Penal Code unless otherwise stated.

wounds.[2] Earl Perry was also struck but he lived.[3] The issue at trial was the shooter's identity.

One witness, F.G., identified appellant as the shooter. According to F.G., he had been with Greenberry inside the social hall before this shooting occurred.[4] Inside the hall, a brief verbal altercation had occurred between appellant and Greenberry. Greenberry had lunged at appellant. F.G. had restrained Greenberry and appellant had exited the building. About five minutes later, Greenberry, F.G., Perry and another friend of Greenberry's, Eddie Land, also left the hall.[5]

On a nearby street corner, Greenberry and appellant had another verbal altercation. During this exchange, F.G. saw appellant pull out a black semiautomatic handgun from his waistband. According to F.G.'s trial testimony, the gun appeared to be pointed at the ground and F.G. heard three shots. Everyone scattered and F.G. lost sight of everybody. F.G. then heard three more shots. He did not see either Greenberry or Perry get shot.

F.G. testified that he heard a total of six shots during this incident, which he said happened "pretty quick."[6] F.G. saw Greenberry standing near his vehicle. Greenberry slumped to the ground and F.G. called 911.

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[2] Greenberry's three wounds did not show signs of stippling, which indicated these shots were fired from more than three feet away.

[3] Perry was shot through an arm and through his chest. At trial, he testified he was intoxicated that night and he did not know what caused the shooting. He denied knowing who shot him.

[4] F.G. informed the jury that he drank alcohol on the night in question at the social hall. When asked how much he drank, he answered it was a birthday party "so pretty good, I guess." He denied being drunk that night.

[5] Land did not witness the shooting. At trial, he testified that he went in an opposite direction than Greenberry and Perry when they exited the social hall. Perry testified that he exited the hall with Greenberry. F.G. testified that he did not know either Land or Perry, who were from Los Angeles and were Greenberry's friends.

[6] Land testified that he heard a total of five or six shots.

At the crime scene, F.G. told an officer that he knew appellant from the neighborhood, but he did not know appellant's name.[7] At the police station, much later that same day, F.G. told a homicide detective that he did not know appellant's name, but he had known him for a long time from clubs. The homicide detective showed two photographic lineups to F.G. He identified appellant's picture in the second lineup as the shooter.[8] At trial, the homicide detective confirmed that appellant was the same individual that F.G. selected from the photo as the shooter.[9]

At trial, F.G. identified appellant as the person who had an altercation with Greenberry and who pulled out a handgun just before shots were fired. He told the jury he had known appellant for over 20 years. They were not friends but "associates." They would "chit chat" when seeing each other at clubs. He used to see appellant "around the neighborhood and stuff like that." About a month before this incident, F.G. had encountered appellant at a club. According to F.G., appellant was known as "Spicy Mike" on the street.

F.G. believed appellant had been waiting for Greenberry when they left the hall that night. F.G. told the jury that he had not remembered appellant's name that night because "everything was all blurry and going pretty fast. I couldn't think of his name at the time." On cross-examination, F.G. admitted that, prior to this incident, he did not

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7 At trial, this officer estimated that 30 to 40 people were in the area after police arrived at the crime scene. The officer did not obtain any statements from any of the bystanders.

8 Shortly after this shooting, the homicide detective learned that some people "were talking" and claiming that a man known as "Spicy Mike" was responsible for this homicide. The first lineup shown to F.G. included a photo of Michael Stamps, whom an officer knew as "Spicy Mike." The second lineup included appellant's photograph. F.G. only selected appellant's photo from the two lineups.

9 According to the trial court, all photos in the lineups, including appellant's, showed "males of the same race with the same short hair with mustaches and goatees and the same general expressions." Appellant's photo had been obtained from the Fresno County Booking System.

know appellant's name. He told law enforcement that he did not know any nicknames for appellant. It was after this incident that F.G. learned appellant's first name.

B. F.G.'s inconsistent statements regarding how this shooting occurred.

F.G. made certain inconsistent statements regarding this shooting. On the day of this shooting, he had three separate interviews with law enforcement personnel. The first occurred with an officer at the crime scene. The second happened with a night detective at the hospital.[10] This conversation was recorded and played for the jury. The final conversation took place at the police station with a homicide detective much later that same day. This interview was also recorded and played for the jury.

During his three interviews, F.G. generally indicated that, during the verbal altercation on the street corner, appellant pulled out a handgun and initially fired three shots into the ground. Greenberry ran northbound. Appellant chased Greenberry and fired three additional shots.

During his final interview with the homicide detective, F.G. changed his story slightly. He said that, when appellant pulled out the gun, Greenberry and his friend (presumably Perry) "had no other choice" and they lunged toward appellant. Appellant fired three shots possibly into the ground and everyone began running. Later in the interview, F.G. said that Greenberry did not "rush" appellant but Greenberry had "kinda made body movements" just before appellant pulled out the gun.

At trial, F.G. provided a different story. He told the jury that Greenberry first "lunged" or "flinched" at appellant on the street corner before appellant pulled out the gun. According to F.G., Greenberry and at least one other male (presumably Perry) then chased appellant before three additional shots were fired. According to F.G.'s trial testimony, appellant was "running for his life" because he was being chased. However,

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10 The record suggests F.G. went to the hospital to check on Greenberry's status.

despite testifying that appellant ran from the others, F.G. denied at trial that anyone other than appellant had a weapon.[11]

At trial, when asked about his prior inconsistent statements to law enforcement, F.G. said he had initially assumed that Greenberry and his friend had run northbound up the sidewalk. He said people had been leaving the social hall and they were running in all directions. He denied telling an officer that appellant had chased Greenberry and he could not recall telling an officer that he saw appellant chase Greenberry before hearing more gunshots.[12] He also could not recall saying that appellant pulled out a gun before anyone lunged at him.

C. Conflicts in the evidence regarding appellant's appearance.

The evidence was in conflict about whether F.G.'s description of the shooter matched appellant's appearance on the night in question. As explained below in greater detail in section II, two defense witnesses testified at trial that, on the night of this shooting, appellant had a goatee, mustache and short hair. The two defense witnesses also testified that appellant wore a long-sleeved shirt, jeans and glasses.

In contrast, right after this incident, F.G. told an officer that the shooter was clean shaven. He said the shooter's hair was long, slicked back, and a "straight perm in a pony tail." The shooter was in his mid-40's and about five feet nine inches tall. The shooter had been wearing "a gray T-shirt and blue jeans."

At the hospital on the night in question, F.G. told the detective that the shooter had worn a gray T-shirt. The shooter had "a straight perm with a ponytail." F.G. denied that the shooter's hair had "S-curls" and he said the shooter was in his 40's with "brown

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[11] At trial, both Perry and Land denied that either of them, or Greenberry, had any weapons on them on the night of this shooting.

[12] At trial, the homicide detective said that F.G. never mentioned that either Greenberry or his friend had chased the shooter.

skin." F.G. denied that the shooter was either light or dark skinned.[13] The shooter was around five feet nine inches tall with a medium build. On two separate occasions, F.G. denied that the shooter had facial hair. F.G. told this detective that he could identify the shooter because "I been seein' him for years."

Much later that same day, F.G. told the homicide detective while at the police station that the shooter wore a gray T-shirt and jeans. The shooter had "a ponytail. Straight perm like ponytail." He also said the shooter had "like a small mustache."

At trial, F.G. said the shooter had "longer hair" and a "pony tail going straight back."[14] F.G. denied, however, saying that the shooter had no facial hair. Instead, he testified, "I said [the shooter] had, like, a little mustache." He did not remember telling the night detective that the shooter had no facial hair. At trial, F.G. said the shooter wore a "gray or black" shirt.

D. Law enforcement's investigation.

Responding officers found six .40-caliber firearm casings near the sidewalk and on the street.[15] Testing confirmed that the same type of gun fired all six rounds.

At the crime scene, law enforcement saw a "blood trail" on the sidewalk heading north. An "opened pocket knife" was found nearby on the sidewalk. Blood was on the knife located at a "knob" or "post" that engages or straightens the knife. Blood was also found on the back bumper and the license plate of a black Honda parked near

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13 In contrast to F.G.'s statements, Perry had informed the same detective at the hospital that the shooter was a black male in his 40's with a *light* complexion. Perry's interview was recorded and played for the jury.

14 At the time of trial, the record suggests that appellant's hair was short, and he had a mustache and goatee.

15 A responding police officer testified at trial that the area was "well lit" where the investigation occurred, but there was one light on the social hall that was not working. According to the officer, there were about three streetlights in the area that were working. In addition, two lights on the east side of the hall were working, along with a light at the southwest corner of that building.

Greenberry's SUV. Blood was also just below the Honda's bumper.[16] A bullet hole was observed in the Honda's right rear side. A deformed bullet was later extracted from that vehicle.

DNA testing confirmed that the blood on the knife was consistent with Greenberry's reference profile, but there were multiple contributors of DNA to this sample. The blood on the ground belonged to Greenberry.

According to the homicide detective, it appeared that Greenberry had slumped to the ground near the black Honda, which had been parked behind Greenberry's vehicle. Law enforcement was unable to identify who owned the knife.

About two days after this shooting, appellant turned himself into police custody while accompanied by his attorney.[17] Police never determined the location of appellant's residence and they did not write any search warrants during this investigation.

II. The Relevant Facts From The Defense Case.

Appellant did not testify at trial. We summarize his relevant evidence.

A. The testimony of appellant's friend, L.B.

A friend of appellant, L.B., testified he had known appellant 30 plus years. Appellant's nickname was Spicy Mike. L.B. had accompanied appellant to the social hall on the night of this shooting. They arrived in separate cars. According to L.B., appellant had short hair that night, along with a goatee. Appellant wore a collared long-sleeved shirt, jeans, loafers and glasses. L.B. told the jury that the social hall had a dress code "so you have to dress up." They entered the social hall together, but they were not always together that night. L.B. was not certain what time appellant left the social hall, but he

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[16] No fingerprints taken at the scene from vehicles matched appellant's fingerprints.

[17] During closing arguments, defense counsel asserted that appellant did not turn himself in for the crime, but police had contacted his sister, who called him. The prosecutor objected that this assumed facts not in evidence. The trial court sustained that objection.

agreed it was sometime before 2:00 a.m. At some point, L.B. heard gunshots while he was inside the hall. He left the club and saw a police car blocking the street. L.B. knew where appellant had parked his car that evening. When L.B. got to that location, appellant's vehicle was gone.[18]

B. The testimony from the barbeque owner.

The owner of a local barbeque stand testified that he had known appellant for over 20 years. On the night of this shooting, appellant purchased some food from his stand at about 1:30 a.m. The barbeque stand was located near the social hall. The owner talked with appellant for about 10 minutes and then appellant left. Appellant walked away from the food stand going in a direction away from the social hall. Appellant had a mustache and goatee that night, and his hair was short. According to the owner, appellant wore a long-sleeved blue shirt that was buttoned-up, along with glasses. The owner denied that appellant had a straight "perm" or a ponytail on the night of this shooting.

On cross-examination, the owner admitted that he had told an investigator that he saw appellant at about 1:50 a.m. The owner also stated, however, that he did not hear the shots on the night in question for another 30 to 40 minutes after appellant left his stand.

III. The Prosecution's Rebuttal Evidence.

An investigator in the prosecutor's office testified regarding attempts to speak with L.B. and the barbeque owner prior to trial. According to the investigator, the barbeque owner failed to make himself available for an interview despite repeated attempts. L.B. failed to call the investigator back despite repeated attempts to contact him.

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[18] At trial, the homicide detective stated that law enforcement never identified the vehicle that appellant used that night.

DISCUSSION

We address first the claims involving the sufficiency of the evidence and prosecutorial misconduct. We then turn to the remaining issues on appeal.

I. Substantial Evidence Supports Appellant's Convictions.

Appellant contends the prosecution presented insufficient evidence to establish that he was the shooter in this incident. He seeks reversal of his convictions for Greenberry's murder and Perry's attempted murder.

A. Standard of review.

When considering a challenge to the sufficiency of the evidence to support a conviction, we review the record in the light most favorable to the judgment and decide whether it contains substantial evidence from which a reasonable finder of fact could make the necessary finding beyond a reasonable doubt. The evidence must be reasonable, credible and of solid value. We presume every inference in support of the judgment that the finder of fact could reasonably have made. We do not reweigh the evidence or reevaluate witness credibility. We cannot reverse the judgment merely because the evidence could be reconciled with a contrary finding. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 293.)

B. Analysis.

Appellant argues that F.G.'s identification was not credible. Appellant points to numerous concerns, including F.G.'s inconsistent statements. Appellant notes that no forensic evidence linked him to this shooting. He relies on three opinions: (1) *People v. Reyes* (1974) 12 Cal.3d 486 (*Reyes*); (2) *People v. Hall* (1964) 62 Cal.2d 104 (*Hall*); and (3) *People v. Gould* (1960) 54 Cal.2d 621 (*Gould*), overruled on other grounds in *People v. Cuevas* (1995) 12 Cal.4th 252, 271–272.

Appellant's arguments and his cited authorities are unpersuasive. Although the jurors were required to resolve disputed issues of fact, including credibility, they had

substantial evidence to convict appellant for these crimes. We start by summarizing appellant's three cited opinions before turning to the record.

1. *Reyes, supra,* 12 Cal.3d 486.

In *Reyes, supra,* 12 Cal.3d 486, the defendants, Reyes and Venegas, were convicted of first degree murder. The victim had been killed in his apartment. (*Id.* at p. 491.) On the morning of the murder, multiple witnesses heard an altercation inside the victim's apartment. At least one witness believed he had heard two strange voices. The witnesses then saw a man outside the victim's apartment. At trial, none of the witnesses could positively identify that person as Venegas. (*Id.* at pp. 492–493.) At trial, Reyes confessed to the killing but exonerated Venegas. His defense was diminished capacity. (*Id.* at p. 494.)

On appeal, the Supreme Court agreed with Venegas that the trial evidence was insufficient to support the judgment against him. (*Reyes, supra,* 12 Cal.3d at p. 496.) The evidence was "tenuous at best" that two suspects were involved in this crime. (*Id.* at p. 498.) Further, the evidence was overwhelming that it was Reyes who ran from the victim's apartment. (*Id.* at p. 499.) There was negligible evidence indicating that Venegas participated in the murder. (*Ibid.*) Although Venegas had been seen with Reyes before and after this crime, that only generated "suspicion" which is insufficient to support a conviction. (*Id.* at p. 500.) Unlike Reyes, when Venegas was arrested that same morning, he had no physical signs of struggle on his body. Venegas did not have bloodstained clothes and his fingerprints were not in the victim's apartment. (*Ibid.*) The *Reyes* court reversed Venegas's conviction for insufficient evidence. (*Ibid.*)

2. *Hall, supra,* 62 Cal.2d 104.

In *Hall, supra,* 62 Cal.2d 104, the defendant was found guilty of second degree murder. (*Id.* at p. 106.) The victim had been stabbed to death in the common kitchen at her residence, a hotel. (*Ibid.*) That morning, two residents had heard a commotion. The decedent had addressed a person named "Monroe." Interviews with others indicated that

the defendant was the only Monroe that the decedent knew. (*Ibid.*) He had lived at the hotel and he had a criminal record. Although he had not been seen at the hotel premises for at least two weeks, he was arrested that evening when found on the street. (*Id.* at pp. 106–107.) The defendant had some spots of blood on his shoes, and one spot was identified as human blood, but there was not enough to determine its type. (*Id.* at p. 107.) One chemist testified that this spot, and two others, appeared fresh, but testing was not done to determine the actual age. (*Ibid.*) A police officer noted that the defendant's shoes had been "unusually scrubbed and whitened." (*Ibid.*) The defendant had two scratches on his face. (*Id.* at p. 108.) At trial, the defendant testified and provided an explanation of his whereabouts on the day in question. Other witnesses corroborated his testimony in many details. (*Id.* at p. 109.) At the close of the trial, the prosecution revealed that police had found no damaging evidence after searching the defendant's apartment. (*Ibid.*)

The *Hall* court reversed the defendant's conviction due to insufficient evidence. (*Hall*, *supra*, 62 Cal.2d at p. 109.) The decedent's use of the name "Monroe" was inconclusive. It was likely she had a wide and private circle of acquaintances because she had been convicted of narcotics addiction, prostitution and soliciting. Neither witness was certain whether she said Monroe at the beginning or the end of the statements in question. "Thus, even if she knew no other Monroe, the testimony concerning her utterances leaves open the substantial possibility that she was naming him in answer to inquiries or accusations by her assailant rather than as her assailant." (*Id.* at p. 110.) The blood on the defendant's shoes was unconvincing. No evidence connected it to the decedent. (*Ibid.*) The scrubbed appearance of the defendant's shoes had little probative value. (*Id.* at pp. 110–111.) The scratches on the defendant's face added nothing because no skin was found under the decedent's fingernails and no other evidence showed she scratched her assailant. (*Id.* at p. 111.) Bloody shoeprints were found near the decedent's body, but nothing indicated that the defendant's shoes matched those

prints. (*Ibid.*) Moreover, glass lodged in the soles of his shoes was not like glass found near a broken window close to the decedent's body. No motive for this crime was established, and nothing else connected the defendant to this murder. (*Id.* at p. 112.) The Supreme Court reversed the judgment. (*Ibid.*)

3. *Gould, supra,* 54 Cal.2d 621.

In *Gould, supra,* 54 Cal.2d 621, the defendants, Gould and Marudas, were convicted of second degree burglary. (*Id.* at p. 624.) The victim had returned to her residence and found a man outside her front door, which was slightly ajar. A second man was inside the apartment. The men fled, and she discovered that money was missing from her purse. (*Id.* at pp. 624–625.) The victim identified the two defendants from police photographs. (*Id.* at p. 625.) Gould eventually admitted to police his involvement in this crime. When asked about his accomplice, Gould mentioned a male that was not Marudas. At all times, Marudas denied any knowledge of this crime. (*Ibid.*)

At trial, the victim could not identify anyone in the courtroom as the man she saw outside her front door. She believed Gould had some features of the man she saw inside her apartment, but he seemed thinner than the burglar. (*Gould, supra,* 54 Cal.2d at p. 625.) She also said the pictures she selected after the crime were like the burglars but not all features were the same. An officer, however, testified that the victim had been sure of her photo identifications when she first selected them. (*Ibid.*)

Our Supreme Court affirmed Gould's conviction, finding his admissions after his arrest were sufficient for the jury's finding that he participated in the crime. (*Gould, supra,* 54 Cal.2d at p. 625.) Regarding Marudas, however, the Supreme Court reversed his conviction. The victim was unable to identify him in court as the man she saw outside her front door. (*Gould, supra,* 54 Cal.2d at p. 630.) Gould did not identify Marudas as his accomplice but directed police to another man. (*Ibid.*) Unlike Gould, Marudas always denied any knowledge of this crime. (*Ibid.*) The Supreme Court rejected the government's argument that Marudas's conviction should be sustained

because he had provided an evasive statement to police when he was arrested. When asked where he had been on the day of the crime, Marudas allegedly replied he did not know but, when he got to court, he would have four or five people " 'place me where I want to be.' " (*Id.* at pp. 630–631.) The high court rejected the argument that a consciousness of guilt could be inferred from this alleged statement. (*Id.* at p. 631.) Finally, the *Gould* court found unpersuasive that the victim had selected Marudas's photograph. The small size of the photographic group increased the danger of suggestion. The victim then failed to identify Marudas in court. No other evidence tended to identify Marudas as the burglar. Marudas's judgment was reversed.[19] (*Ibid.*)

4. This record has substantial evidence supporting the convictions.

This record contains substantial evidence from which a reasonable jury could conclude that appellant was guilty beyond a reasonable doubt. It is undisputed that appellant was at the social hall on the night in question. His own witnesses placed him in the area of this shooting just before 2:00 a.m.

Appellant's authorities are distinguishable. Unlike in *Reyes*, *Hall*, and *Gould*, the jury heard testimony from an eyewitness who was present at the shooting. The direct evidence of one witness is sufficient for proof of any fact. (Evid. Code, § 411.) Both prior to trial and at trial, F.G. repeatedly identified appellant as the man who was waiting for Greenberry at the street corner. F.G. consistently informed law enforcement and the jury that appellant pulled out a gun just before shots were fired. This record is devoid of

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19 *Gould* held that "[a]n extrajudicial identification that cannot be confirmed by an identification at the trial is insufficient to sustain a conviction in the absence of other evidence tending to connect the defendant with the crime." (*Gould, supra,* 54 Cal.2d at p. 631.) However, in *People v. Cuevas, supra,* 12 Cal.4th 252, the Supreme Court overruled this holding in *Gould*. Instead, "the sufficiency of an out-of-court identification to support a conviction should be determined under the substantial evidence test of *People v. Johnson* (1980) 26 Cal.3d 557, 578 that is used to determine the sufficiency of other forms of evidence to support a conviction." (*People v. Cuevas, supra,* 12 Cal.4th at p. 257.)

any evidence establishing or even suggesting that anyone else had a gun during this incident. *Reyes, Hall,* and *Gould* do not dictate reversal in this situation.

Although there were factual conflicts in the evidence, it was the jury's role to determine witness credibility, and the truth or falsity of the determinative facts. (§ 1127; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 162.) The trial evidence presented a substantial evidentiary conflict whether F.G.'s description of the shooter matched appellant's appearance on the night in question.[20] The jury, however, was entitled to give full credit to F.G.'s identification and likewise discredit the defense witnesses. Based on the verdicts rendered, it is apparent the jury found F.G.'s identification credible despite the factual conflicts. We do not reweigh the evidence or reevaluate witness credibility. We cannot reverse the judgment merely because the evidence could be reconciled with a contrary finding. (*People v. D'Arcy, supra,* 48 Cal.4th at p. 293.)

Of course, inherently improbable testimony may be rejected on appeal. (*People v. Mayberry* (1975) 15 Cal.3d 143, 150; *People v. Ontiveros* (1975) 46 Cal.App.3d 110, 117.) To reject on appeal a witness who was believed by the trier of fact, either the witness's statements must be physically impossible that they are true, or their falsity must be apparent without resorting to inferences or deductions. (*People v. Mayberry, supra,* 15 Cal.3d at p. 150.) Although F.G. provided inconsistent statements about how this shooting occurred and the appearance of the shooter, his identification of appellant as the shooter was not inherently improbable. As such, we reject appellant's contention that we should disregard his identification at trial.

We are also not required to ask whether we believe the trial evidence established guilt beyond a reasonable doubt. (*People v. Johnson, supra,* 26 Cal.3d at p. 576.) Rather, the issue is whether any rational jury could have found the essential elements of

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20 We note that a responding police officer testified at trial that the area was "well lit" where this shooting investigation occurred.

the crime beyond a reasonable doubt after viewing the evidence favorably for the prosecution. (*Ibid.*) We are to presume the existence of any fact the jury could have reasonably deduced from the evidence in support of the judgment. (*Ibid*.) Thus, we will not analyze the alternative inferences which the jury could have made from the evidence in this record.

Finally, although F.G. admitted he did not see appellant shoot either Greenberry or Perry, the jury was entitled to make reasonable inferences based on circumstantial evidence. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1166.) The standard of review is the same in which a conviction is based primarily on circumstantial evidence. (*People v. Clark* (2016) 63 Cal.4th 522, 625.) "In a case built solely on circumstantial evidence, none of the individual pieces of evidence 'alone' is sufficient to convict. The sufficiency of the individual components, however, is not the test on appeal." (*People v. Daya* (1994) 29 Cal.App.4th 697, 708.) Rather, when reviewing the sufficiency of circumstantial evidence, we must consider such evidence cumulatively and determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt. (*Id.* at p. 709.)

No evidence in this record establishes that anyone other than appellant had a gun during this incident. Viewing the cumulative circumstantial evidence, a reasonable jury could have determined it was appellant who shot both Greenberry and Perry. (See *People v. Daya*, *supra*, 29 Cal.App.4th at p. 709.)

Based on F.G.'s identification and the evidence received about this incident, a reasonable jury could have concluded beyond a reasonable doubt that appellant shot both Greenberry and Perry. The evidence from this record was reasonable, credible and of solid value. Accordingly, the jury had substantial evidence to determine appellant's guilt and this claim fails.

II. Although Prosecutorial Misconduct Occurred During Closing Arguments, Appellant Forfeited This Claim And No Prejudice Occurred.

Appellant contends the prosecutor committed misconduct during closing arguments. He seeks reversal of his convictions.

A. Background.

During rebuttal arguments to the jury, the prosecutor noted that F.G. changed his story regarding how this shooting occurred. The prosecutor asserted that the physical evidence did not match F.G.'s trial testimony but matched his previous statements to police "before he could be affected by any outside influences. I don't know what happened to [F.G.] over these last 11 months." The prosecutor asserted that appellant's family was involved in getting the barbeque owner to testify. "So who knows what else is going on behind the scenes, but what I do know is that the day of, before it could be affected by anything, any external issue, [F.G.] gave a consistent story that's consistent with the physical evidence. Not exact, but consistent. And he's also very clear that he never lied to the cops, was always truthful, so let's talk about what he said." Later in her rebuttal argument, the prosecutor stated she could not explain why F.G. "now has a different story regarding [appellant] backing up and being chased but the physical evidence doesn't support that version." According to the prosecutor, F.G.'s statements to the officer and detectives represented the truth. F.G.'s earlier statements were made "before anyone could get to him, before anyone could taint him, or change his mind."

B. Standard of review.

A prosecutor's misconduct violates the federal Constitution and requires reversal when it infects the trial with such unfairness as to deny due process. (*People v. Tully* (2012) 54 Cal.4th 952, 1009.) Under state law, a prosecutor's conduct that does not render a criminal trial fundamentally unfair is still misconduct if it involves the use of deceptive or reprehensible methods in attempting to persuade the trier of fact. (*Id.* at pp. 1009–1010.) To prevail on a claim of prosecutorial misconduct based on remarks to

the jury, the defendant must show a reasonable likelihood the jury understood or applied the disputed comments in an improper or erroneous manner. (*People v. Centeno* (2014) 60 Cal.4th 659, 667.)

C. Analysis.

Appellant argues the prosecutor improperly suggested that appellant's family tainted F.G.'s trial testimony. He concedes he never objected when the prosecutor made these arguments. He asserts, however, that any objection and admonition to the jury would have been futile. He claims his failure to object should be excused in this situation.[21]

In contrast, respondent asserts forfeiture based on defense counsel's inaction in the trial court. In the alternative, respondent contends the prosecutor properly commented on the state of the evidence and stated her own beliefs. Finally, respondent argues that any presumed misconduct was harmless.

We agree that prosecutorial misconduct occurred. However, in failing to raise this issue before the trial court, appellant has forfeited this claim on appeal. In any event, we also determine that this misconduct was not prejudicial.

1. The prosecutor's comments constituted misconduct.

A criminal prosecutor has great latitude when making a closing argument. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1330.) A prosecutor's closing arguments may be strongly worded and vigorous so long as she fairly comments on the evidence. (*Ibid.*) A prosecutor may ask the jury to draw reasonable inferences and deductions from the evidence. (*Ibid.*) A prosecutor is permitted to fully state her views regarding what the evidence establishes and to urge whatever conclusions she deems proper. (*People v. Panah* (2005) 35 Cal.4th 395, 463.) However, a prosecutor commits misconduct when

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[21] Appellant did not assert a claim of ineffective assistance regarding his trial counsel's failure to object to the prosecutor's comments.

she misstates evidence during closing arguments. (*People v. Davis* (2005) 36 Cal.4th 510, 550.)

It is misconduct for a prosecutor to vouch for a witness by relying on facts outside the record. (*People v. Rodriguez* (2018) 26 Cal.App.5th 890, 905; accord *People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1584.) The Supreme Court has repeatedly warned that it is clear misconduct for a prosecutor to argue about facts that are not in evidence. (*People v. Hill* (1998) 17 Cal.4th 800, 827–828; *People v. Bolton* (1979) 23 Cal.3d 208, 212.) When a prosecutor argues about facts not in evidence, a jury can place great value in it because of the special regard a jury has for the prosecutor. (*People v. Hill, supra,* 17 Cal.4th at p. 828.) " 'Statements of supposed facts not in evidence … are a highly prejudicial form of misconduct, and a frequent basis for reversal.' " (*Ibid.*)

Here, although the prosecutor was entitled to comment on the change in F.G.'s testimony, the prosecutor went too far and suggested that appellant's family, or someone else, contacted F.G. and may have influenced his testimony. Nothing in this record, however, established or even reasonably suggested that appellant's family had contact with F.G. Nothing established or reasonably suggested that anyone, let alone appellant's family, may have attempted to influence F.G.'s trial testimony.[22] The prosecutor did more than ask the jury to draw reasonable inferences and deductions from the evidence.

Based on this record, the prosecutor's reference to matters outside the record constituted prosecutorial misconduct. (See *People v. Davis, supra,* 36 Cal.4th at p. 550; *People v. Rodriguez, supra,* 26 Cal.App.5th at p. 905; *People v. Alvarado, supra,* 141 Cal.App.4th at p. 1584.) Thus, we turn to the questions of forfeiture and prejudice.

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[22] At trial, F.G. denied knowing appellant's family, but stated he knew appellant was "kin to certain people, but I don't, like, know them know them."

2. Appellant has forfeited this claim.

As a rule, a claim of prosecutorial misconduct is forfeited if the defense fails to object and fails to request an admonition to cure any harm. (*People v. Centeno, supra,* 60 Cal.4th at p. 674; *People v. Tully*, *supra*, 54 Cal.4th at p. 1010.) "The defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Centeno, supra,* 60 Cal.4th at p. 674.)

Appellant argues that any objection in this situation would have been futile. We disagree. The prosecutor's argument was not so extreme or pervasive that a prompt objection and admonition would not have cured the harm. (*People v. Centeno, supra,* 60 Cal.4th at p. 674.) As such, appellant has forfeited this claim on appeal. In any event, we also reject this claim based on a lack of prejudice.

3. The misconduct was not prejudicial.

The Fourteenth Amendment to the United States Constitution is violated when a prosecutor's misconduct denies the defendant's right to a fair trial, which is a denial of due process. (*People v. Tully*, *supra*, 54 Cal.4th at p. 1009.) A fundamentally unfair trial may arise from a prosecutor's pattern of egregious conduct. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214–1215.) Even if the prosecutor's actions do not violate due process, California law is violated if the prosecutor used deceptive or reprehensible methods to attempt to persuade the jury. A conviction will be reversed for prosecutorial misconduct if it is reasonably probable that a result more favorable to the defendant would have been reached without the prosecutor's improper conduct. (*People v. Tully*, *supra,* 54 Cal.4th at pp. 1009-1010.)

We disagree with appellant's argument that this misconduct was prejudicial. It is undisputed that appellant was at the social hall on the night in question. Both prior to trial and at trial, F.G. repeatedly identified appellant as the man who was waiting for Greenberry at the street corner. F.G. consistently informed law enforcement and the jury

that appellant pulled out a gun just before shots were fired. This record is devoid of any evidence establishing or even suggesting that anyone else had a gun during this incident.

Although F.G. changed his explanation regarding how this shooting occurred, he never wavered, either before or during trial, in identifying appellant as the shooter. He consistently told the police that he could identify the gunman. He selected appellant's photo shortly after this crime. He told the jury that he had known appellant for about 20 years. He explained at trial why he could not remember appellant's name on the night in question.

The jurors deliberated for about 10 hours over a three-day period. They requested readback of testimony from F.G., Perry and the homicide detective. They requested the written transcripts of Perry's hospital interview, F.G.'s hospital interview, and his interview at the police station. The jury asked for clarification whether the attempted murder charge only applied to Perry. This record demonstrates that the jury conscientiously performed its civic duty. (*People v. Walker* (1995) 31 Cal.App.4th 432, 439.)

Based on this record, it is not reasonably probable that a result more favorable to appellant would have been reached without the prosecutor's improper conduct. (See *People v. Tully, supra,* 54 Cal.4th at pp. 1009–1010.) Although the prosecutor's comments were inappropriate, they were very brief. The prosecutor did not engage in repeated or egregious conduct. These statements were not emphasized. Based on the jury's conscientious performance of its duties, it is unlikely these brief comments had much, if any, impact on the jurors.[23] F.G. consistently told the police that he could

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23 At various times in his briefs, appellant contends that the length of the deliberations and the request for readback of testimony indicate this was a close case. We agree with appellant's general proposition that the length of jury deliberations can suggest a case was close. (*People v. Cardenas* (1982) 31 Cal.3d 897, 907.) In addition, requests for readback of testimony and jury questions are indications the deliberations were close. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295.) This trial, however,

identify the gunman and he never wavered, either before or during trial, in identifying appellant as the shooter. Thus, we will not reverse appellant's convictions. Accordingly, based on forfeiture and a lack of prejudice, we reject this claim.

III. The Trial Court Did Not Abuse Its Discretion In Admitting Certain Testimony.

Appellant asserts the trial court erred by admitting certain testimony, which he asserts was inadmissible hearsay evidence. He seeks reversal of his convictions for this alleged evidentiary error.

A. Background.

During trial, Perry testified for the prosecution. He confirmed on direct examination that he was at the social hall on the night in question. He became intoxicated and he did not know what had caused the shooting. He denied knowing who shot him. Perry recalled talking to a detective at the hospital, but he could not recall talking about whether an argument had occurred on the night in question.[24]

During redirect examination, Perry discussed a conversation he had with a defense investigator prior to trial. The prosecutor asked Perry: "And what did the defense investigator tell you about the evidence in this case?" Defense counsel objected on hearsay grounds, which the trial court overruled. According to Perry, the investigator said Perry's medical report could be used and Perry would not have to come to trial.

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involved charges of first degree murder and attempted murder. Based on the gravity of the charges, we cannot declare that the length of these deliberations was necessarily significant in this situation. (See *People v. Taylor* (1990) 52 Cal.3d 719, 732 [rejecting argument that length of deliberations showed a close case considering the gravity of the jury's task based on the multiple charges and special circumstance allegations].)

[24] Later in the trial, the jury learned that, on the night of the shooting, a detective had interviewed Perry at the hospital. That conversation was recorded and played for the jury. During the conversation, Perry agreed that somebody had argued with Greenberry during the evening.

The prosecutor then asked Perry if the defense investigator had discussed the shell casings recovered at the crime scene. Perry agreed. According to Perry, the defense investigator had claimed that more than one person fired a gun that night and different shell casings were found at the crime scene.

B. Analysis.

The parties disagree on three points. They dispute (1) whether appellant has forfeited this issue; (2) whether the trial court abused its discretion in permitting this testimony; and (3) whether this evidence was prejudicial. As discussed below, we disagree with respondent's claim that appellant has forfeited this issue. However, we agree with respondent that any presumed error was harmless. While there may be a dispute whether this testimony constituted hearsay, any error by the court in its admission was harmless. As such, we need not address whether the trial court abused its discretion in permitting this testimony because this claim fails due to a lack of prejudice. After discussing the issue of forfeiture, we proceed directly to the issue of prejudice.

1. This issue was not forfeited.

Forfeiture is defined as the failure to make the timely assertion of a right. (*United States v. Olano* (1993) 507 U.S. 725, 733.) To avoid forfeiture, a criminal defendant must call the trial court's attention to any infringement of rights or risk losing them. (*People v. Saunders* (1993) 5 Cal.4th 580, 590 & fn. 6.)

Respondent asserts that appellant forfeited this issue because defense counsel did not renew a hearsay objection after his first objection was overruled. We disagree. A defendant is excused from making a timely objection if it would be futile to do so. (*People v. Boyette* (2002) 29 Cal.4th 381, 432.) Based on the hearsay objection that had just been lodged and overruled, we agree with appellant that he was excused from making another hearsay objection. Thus, we will review the merits of this claim. We determine, however, that any presumed error was harmless. As such, we need not analyze whether the trial court erred in overruling the hearsay objection.

2. Any presumed error is harmless.

Appellant contends the evidence about the defense investigator's statements regarding multiple shooters and different recovered shell casings suggested the defense team was trying to give Perry incorrect information to alter his testimony. This record does not demonstrate prejudice.

The harmless error test of *People v. Watson* (1956) 46 Cal.2d 818 is used to analyze an evidentiary error that involves state law. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) The question is "whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*Ibid*.)

This alleged evidentiary error was harmless. The prosecutor's closing argument covers about 14 pages in this record. Defense counsel's argument spans about 22 pages. The prosecutor's rebuttal argument is about 16 pages. At no time did either counsel mention this brief testimony from Perry. In fact, defense counsel told the jury that Perry provided "no relevant evidence." We find it highly unlikely that the jury placed any value in Perry's statement. We also reject appellant's argument as speculative that the jury might have inferred from this brief testimony that the defense team tried to give Perry incorrect information.

Based on this record, even if the trial court erred when allowing this testimony, it is not reasonably probable the verdict would have been more favorable to appellant absent this alleged error. (See *People v. Partida, supra,* 37 Cal.4th at p. 439.) Accordingly, appellant does not establish prejudice and this claim fails.

IV. The Trial Court Did Not Abuse Its Discretion In Permitting The Barbeque Owner To Testify About Alleged Speculation.

One of appellant's witnesses, the owner of the barbeque stand, testified about appellant's appearance on the night of this shooting. During his recross-examination, the prosecutor asked this witness to explain how he had contacted the defense investigator. The owner indicated that he had given his phone number to appellant's brother, who (the

owner believed) had given it to the investigator. The prosecutor asked the owner if he had any idea why his number was never given to the prosecution. The owner answered "Yes" and defense counsel then objected based on speculation. The trial court overruled the objection, saying the owner could answer "if you know." The owner answered, "He never—I never—he never contacted me until—[.]" The owner did not finish this answer and the prosecutor moved to other questions.

Appellant asserts that the trial court erred in permitting the owner to testify about why his phone number was not provided to the prosecutor. He contends the owner speculated and this evidence suggested improper conduct by the defense. He seeks reversal of his convictions. We disagree that the trial court erred.

A witness must have personal knowledge regarding his or her testimony. (Evid. Code, § 702, subd. (a).) Evidence based on speculation is not admissible. (*People v. Wright* (2016) 4 Cal.App.5th 537, 546.)

The owner said "Yes" when asked if he had any idea why his phone number was never given to the prosecution. The trial court overruled the defense objection, saying the owner could answer if he knew. The owner indicated he knew the answer and the court permitted an answer limited to his personal knowledge. As such, we reject appellant's claim that the trial court's ruling represented evidentiary error.

V. The Trial Court Did Not Abuse Its Discretion In Denying A Motion For New Trial.

Appellant asserts that the trial court abused its discretion in denying a motion for new trial. He contends his motion raised a claim of ineffective assistance of counsel, which the court failed to address.

A. Background.

Prior to sentencing, appellant moved for a new trial. At that time, appellant had new defense counsel. In the moving papers, appellant's new counsel argued, in part, that

photographic evidence should have been introduced at trial to show that appellant had short hair, and a mustache and goatee, on the night of this shooting.

On the day set for sentencing, the trial court addressed appellant's motion. The defense made an offer of proof that a witness would testify that a photo had been taken of appellant the day before this murder occurred. According to the offer of proof, appellant's hair appeared short in the photo and he had facial hair. Defense counsel asserted that this evidence contradicted F.G.'s description of the shooter and it corroborated the defense witnesses.

The prosecutor objected to this evidence. According to the prosecutor, appellant's trial counsel had multiple exhibits that he chose not to enter into evidence. Instead, the defense elicited testimony from witnesses about appellant's appearance. The prosecutor asserted that appellant's trial counsel made strategic decisions. In addition, the prosecutor argued this evidence "was readily available" during trial.

The trial court made the following statements:

> "With respect to the [proposed witness], this witness is being offered in support of the sixth ground for the motion for a new trial, failure to introduce further identifying evidence. The Court has not found any case law to support that that is an appropriate ground for a motion for a new trial, at least not as it has been argued in this case. So the Court does find that [the proposed witness's] testimony would not be relevant."

The trial court tentatively denied the motion for a new trial but was willing to hear additional argument from the defense. Defense counsel asserted that appellant was not the shooter. According to defense counsel, appellant always had a similar hairstyle, a "very short crop with a mustache and goatee." Counsel argued that F.G. misidentified appellant as the shooter. No forensic evidence connected appellant to this crime. According to defense counsel, trial lawyers make strategic decisions but "a wrong decision by an attorney should not be the determining factor in the imprisonment of [appellant] for life."

After hearing additional arguments from the parties, the trial court issued its final ruling, denying the motion. The court made the following relevant comments:

> "The final ground, that photographic and forensics[25] evidence should have been introduced to show that the day of the shooting [appellant] did not fit the description given by the shooter—the description given of the shooter by [F.G.], the defense cites no authority in support of this ground. The argument that the defense failed to introduce specific evidence of how the defendant looked at the time of the shooting is not a statutory basis for a new trial motion as set forth in Penal Code Section 1181 nor is it one of the recognized non statutory grounds for a motion for a new trial."

B. Standard of review.

A deferential abuse of discretion standard is used to review a trial court's ruling on a motion for new trial. (*People v. Lightsey* (2012) 54 Cal.4th 668, 729.) An appellate court will not disturb such a ruling without the appearance of a manifest and unmistakable abuse of that discretion. (*Ibid.*)

C. Analysis.

The parties disagree whether appellant raised an ineffective assistance claim in his motion for new trial. Appellant concedes that the term "ineffective assistance of counsel" was never used. He asserts, however, that enough was written and said "to alert the trial court" about this issue. In contrast, respondent claims that appellant did not call the trial court's attention to this issue. Respondent contends this issue was forfeited and the court did not abuse its discretion.

We need not address the forfeiture issue. When we examine the merits of this claim, an abuse of discretion did not occur.

It is undisputed that a motion for new trial may be granted based on ineffective assistance of counsel. (*People v. Fosselman* (1983) 33 Cal.3d 572, 577.) However, a

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25 Appellant's written brief mentioned "Forensic Evidence" in the opening header for this issue. The defense, however, did not discuss any forensic evidence in either its moving papers or at oral argument.

defendant waives his or her right to a new trial unless a specific ground is asserted in such a motion. (*People v. Masotti* (2008) 163 Cal.App.4th 504, 508.) "Allowing a court to grant a new trial on a ground not raised by the moving party would be the equivalent of allowing the court to grant a new trial on its own motion, an act which the court is without authority to do. [Citations.]" (*Ibid.*)

In this matter, appellant's motion did not assert ineffective assistance of counsel. We reject appellant's assertion that enough was written and said "to alert the trial court" that he was raising such a claim. Instead, the court responded to the issue raised in the motion, heard argument from counsel, and denied the motion. During its tentative ruling, the court stated it had not found any case law to support appellant's motion, "at least not as it has been argued in this case." At no point did appellant clarify his argument, direct the court to any case law, or advise the court that it did not understand the scope of his argument.

Based on this record, the trial court did not misinterpret the law. The court did not exercise its discretion in an arbitrary, capricious or patently absurd manner. Accordingly, an abuse of discretion is not present, and this claim fails.

DISPOSITION

The judgment is affirmed.

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LEVY, Acting P.J.

WE CONCUR:

_____
SMITH, J.

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DE SANTOS, J.